

NO. 44971-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TIMOTHY INGRAM and ROSEMARY INGRAM, husband and wife

Appellants,

vs.

AMERICAN CONTRACTORS INDEMNITY COMPANY,

Respondent.

RESPONDENT'S APPEAL BRIEF

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs Rosemary and Timothy Ingram appeal the trial court's order granting Defendant American Contractors Indemnity Company's ("ACIC") Motion for Summary Judgment for Dismissal. The trial court's order dismissing ACIC should be affirmed because the undisputed facts demonstrate that Plaintiffs' claim against ACIC is untimely as a matter of law.

II. STATEMENT OF THE CASE

This case arises out of multiple alleged instances of defective and incomplete construction on Plaintiffs' residence involving various contractors. The claim relating to this appeal, involves the work of Cal's Custom Construction, who Plaintiffs hired to complete Plaintiffs' deck. Pursuant to RCW 18.27.040, ACIC issued a Contractor's Registration Act surety bond on behalf of Cal's Custom Construction. *CP 6-9.*

According to the allegations in Plaintiffs' Amended Complaint, Cal's entered into a contract to perform work on Plaintiffs' deck in June 2009. *CP 6-7.* Cal's finished performing labor on or about June 17, 2009, and issued a final invoice. *Id.* Plaintiffs paid Cal's in full. *CP 7; CP 83.* Cal's never returned to Plaintiffs' residence to perform any work or make any repairs. None of these facts are disputed.

Plaintiffs filed their Complaint on October 19, 2012. *CP 31-32*. On October 29, 2012, Plaintiffs' filed their Amended Complaint naming Cal's Custom Construction and ACIC as defendants. *CP 1*. ACIC was served through the contractor registration section of the Department of Labor & Industries on November 5, 2012. *CP 27*.

To reiterate, the facts in this case are simple and not in dispute. Cal's Custom Construction issued a final invoice on June 17, 2009, and Plaintiffs paid Cal's Custom Construction in full. *CP 7*. Cal's Custom Construction left the project in a state of disrepair and never returned to Plaintiff's residence to complete the defective work. In every sense of the word, Cal's Custom Construction "abandoned" the work. There are no facts in the present record to show that Cal's Custom Construction returned to the work site or that Cal's Custom Construction made any promises to return. The undisputed evidence shows that Cal's Custom Construction left the work site and never returned. Plaintiffs did not file suit against ACIC until October 2012 – more than 3 years after Cal's Custom Construction terminated its services. *CP 1; CP 6-7*.

On or about March 4, 2013, ACIC filed a CR 12(c) motion for dismissal, which was converted into a motion for summary judgment because matters outside the pleadings were submitted to the Court. Plaintiffs' asserted that the work was neither substantially completed nor

abandoned and, thus, the two-year statute of limitations never commenced and did not expire. On May 10, 2013, the trial court granted ACIC's motion for summary judgment for dismissal. *CP 96-97*. The trial court also awarded ACIC reasonable attorney fees and costs as the prevailing party under RCW 18.27.040(6). *Id.* On July 2, 2013, the parties entered a Stipulation and Order for Entry of Judgment awarding ACIC attorney fees and costs. *CP 98-101*. Plaintiffs appeal the trial court's order granting summary judgment in favor of ACIC.

III. STANDARD OF REVIEW

When reviewing a trial court's summary judgment ruling, the appellate court engages in the same inquiry as the trial court. *Halleran v. Nu W., Inc.*, 123 Wash.App. 701, 709, 98 P.3d 52 (2004). The appellate court must affirm a ruling granting summary judgment if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c).

IV. ARGUMENT

1. The trial court properly granted ACIC's motion for summary judgment because the undisputed facts establish that the work was abandoned in June 2009.

"[T]he legislature has the constitutional power to enact a clear line of demarcation to fix a precise time beyond which no remedy will be available." *Hudesman v. Meriwether Leachman Associates, Inc.*, 35 Wash.

App. 318, 320-21, 666 P.2d 937 (1983). With regard to contractor registration bonds, RCW 18.27.040(3) provides as follows:

Action upon the bond or deposit brought by a residential homeowner for breach of contract by a party to the construction contract shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within two years from the date the claimed contract work was substantially completed or abandoned, whichever occurred first.

Here, there is no factual dispute that Cal's Custom Construction abandoned the work in June 2009. There is no factual dispute that Cal's Custom Construction never returned to the job site. There is no factual dispute that Plaintiffs filed suit against ACIC in October 2012. Given this, Plaintiffs' claim against ACIC is untimely as a matter of law.

Remarkably, Plaintiffs effectively concede in their appeal brief that Cal's Custom Construction abandoned the work. *Appellant's Brief* at 8. ("[A] common sense definition in the context of construction law is the contractor's intentional walking away from a construction project before its completion, leaving an unfinished project for the homeowner to deal with."). That is exactly what occurred here.

Cal's Custom Construction intentionally walked away from the project, issued final invoices, and left Plaintiffs to deal with an unfinished project. Cal's Custom Construction never returned to make any repairs. Plaintiffs have failed to introduce any facts into the record to dispute the

fact that Cal's terminated its services in June 2009 and never returned. Plaintiffs did not file suit against ACIC until October 2012 – more than 3 years after Cal's abandoned the work. Because no reasonable person could conclude otherwise, summary judgment was proper.

2. The trial court properly rejected Plaintiff's highly technical interpretation of "abandon."

In ascertaining the meaning of a particular word as used in a statute, a court must consider both the statute's subject matter and the context in which the word is used. *State v. Rhodes*, 58 Wash.App. 913, 920, 795 P.2d 724 (1990). A term that is not defined in a statute should be given its plain and ordinary meaning unless a contrary legislative intent is indicated. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 813, 828 P.2d 549 (1992).

Plaintiffs advance a highly technical, narrow interpretation of "abandon," which is wholly unsupported by Washington law or any conceivable public policy argument. Under Plaintiffs' interpretation, even if the contractor ceases to perform work, the work is never abandoned if the contractor does not issue a formal written or oral declaration that he is abandoning the work. Plaintiffs offer no practical reason for their bizarre interpretation of abandonment because one does not exist. In many cases, it would indefinitely toll the statute of limitations for contractor

registration bond claims in Washington. This interpretation is unworkable and unreasonable. It would create absurd results.

Moreover, Plaintiffs' entire appellate argument is a self-serving game of semantics. Plaintiffs concede that Cal's terminated its services and ceased performing work, but stubbornly refuse to admit that Cal's "abandoned" the work. This is a distinction without a difference. The bottom line is that Cal's never returned to the project to repair the defective work. Whether we choose to characterize Cal's conduct as cessation of work, termination of services, or abandonment, the end result is the same and there is no practical difference that would warrant tolling the statute of limitations. Simply because Plaintiffs' are left without a remedy against ACIC, does not warrant an equitable tolling of the statute of limitations.

Because there are no facts to support Plaintiffs' argument that Cal's Custom Construction did not abandon the work, Plaintiffs are left to fabricate self-interested semantic distinctions. Significantly, Plaintiffs cannot offer any practical policy reason why the court should adopt its overly strained interpretation of "abandon."

The bottom line is that Cal's ceased performing labor on the project, which triggered the running of the two-year statute of limitation. This is the only reasonable reading of the statute and is consistent with

other jurisdictions which hold that cessation of work triggers abandonment.

3. Plaintiffs cannot cite any case law in support of their interpretation of “abandon.”

Plaintiffs cannot cite any case law which requires a contractor to formally declare that he is ceasing to perform work in order to support a finding of abandonment. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after a diligent search, has found none.” *State v. Logan*, 102 Wn.App. 907, 911, 10 P.3d 504 (2000).

Significantly, Minnesota, like Washington, holds that a finding of abandonment should be based on objective manifestations, e.g., cessation of work, because “[a]n objective standard is also consistent with our contract jurisprudence, from which the principle of abandonment derives.” *Superior Const. Servs., Inc. v. Belton*, 749 N.W.2d 388, 392 (2008).

“Washington continues to follow the objective manifestation theory of contracts.” *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 503, 115 P.3d 262 (2005). Because Washington and Minnesota both follow the objective manifestation theory of contracts, Minnesota law is instructive as to what constitutes abandonment.

For example, Minnesota courts have held that, within the context of construction work, “the actual termination of work can trigger an abandonment.” *Langford Tool & Drill Co. v. Phenix Biocomposites, LLC*, 668 N.W.2d 438, 444 (2003). The Court in *Langford* held that a twelve-month cessation of work was sufficient to support a finding of abandonment. *Id.* at 443. Here, Cal’s ceased performing work in 2009 and issued a final invoice. It was understood between the parties that Cal’s would not return. Plaintiffs were in a position to timely file suit, but neglected to do so. The undisputed evidence supports a finding of abandonment and Plaintiffs have failed to present any factual evidence or legal authority to the contrary. Based on the undisputed evidence and Washington law, the trial court properly granted summary judgment in favor of ACIC.

V. CONCLUSION

The uncontroverted facts show that Cal’s Custom Construction ceased performing work in June 2009 and never returned. At the time Cal’s Custom Construction left the project, it was incomplete and unfinished. For all intents and purposes, the work was abandoned. Plaintiffs failed to file suit against ACIC until October 2012. Given this, Plaintiffs’ claim is time-barred by the applicable statute of limitations set forth in RCW 18.27.040(3). There is no other reasonable conclusion

because there are no disputed facts in the record. The trial court's order granting ACIC's motion for summary judgment for dismissal should be affirmed.

VI. ATTORNEY FEES AND COSTS

Under RAP 14.2, this Court may award costs to the prevailing party on appeal. ACIC respectfully requests an award of its costs incurred on this Appeal. Furthermore, pursuant to RAP 18.1, this Court may award reasonable attorney's fees or expenses on review. ACIC is entitled to reasonable attorney's fees under RCW 4.84.250 and RCW 4.84.290 because this is a claim for \$10,000 or less. In addition, ACIC is entitled to attorney fees under RCW 18.27.040(6) because this is a claim involving a residential homeowner. Finally, ACIC is entitled to attorney fees and costs under the Judgment entered July 2, 2013, which authorizes an award of attorney fees and cost incurred enforcing and/or executing on ACIC's judgment. *CP 98-101*. Accordingly, ACIC respectfully requests an award of its attorney's fees and expenses incurred on this Appeal should it prevail.

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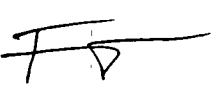
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DATED this 18th day of December, 2013.

YUSEN & FRIEDRICH

By  

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DECLARATION OF SERVICE

Vanessa Stoneburner declares:

On December 18th, 2013, I emailed as well as

mailed a copy of the foregoing document by United States

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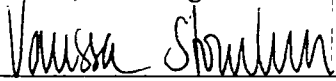
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I declare under penalty of perjury under the laws of
the State of Washington that the foregoing is true and
correct.

EXECUTED THIS 18th day of December, 2013, at

Seattle, Washington.



Vanessa Stoneburner